Bloomberg Law Reports®

January 26, 2012

Banking & Finance

Consumer Financial Protection Bureau

Recess Appointment

Legal Issues Raised by Recess Appointment of the Director of the Consumer Financial Protection Bureau

COVINGTON

COVINGTON & BURLING LLP

Contributed by John Dugan, Stuart Stock, Keith Noreika, and Jennifer Xi, Covington & Burling LLP

- **Two Constitutional requirements for a recess appointment—a Senate "Recess" and an agency "Vacancy"—may have been lacking.**
- **A Constitutionally deficient appointment may invalidate future CFPB actions.**

President Obama announced the recess appointment of Richard Cordray as the Director of the Consumer Financial Protection Bureau (CFPB) on January 4, 2012, during an "adjournment" of a "pro forma" session of the Senate that was scheduled to last for fewer than three days.[1] Questions have been raised about the legal validity of this recess appointment, and about potential consequences of an invalid appointment. While the answers are far from clear, this article briefly identifies the key legal issues raised by the appointment.

Background

The Constitution grants the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[2] If validly appointed, the general view is that a recess appointee has the full power of the office to which the person is appointed as if he or she were confirmed by the Senate.[3] The difference is that a recess appointee's term in that office lasts only until the end of the next session of Congress, which for the new CFPB Director would likely be the end of 2013.[4]

The first question raised by the appointment, which has received much attention in the media, is this: Does the Senate's adjournment of a pro forma session of fewer than three days constitute a valid "recess" within the meaning of the Recess Appointments Clause?

But there is a second, less discussed question as well: Is there a "vacancy" to fill (within the meaning of the Recess Appointments Clause) in light of the fact that the Dodd-Frank Act provided the Secretary of the Treasury with interim authority to perform certain functions of the CFPB until a Director is "confirmed by the Senate"?

Both questions are discussed below.

Whether There Was a Valid "Recess"

It is unclear whether a less-than-three day "adjournment" of a "pro forma" session of the Senate constitutes a "recess" for the purpose of the Recess Appointments Clause. First, there is a question whether a pro forma session is the "functional equivalent" of a recess for purposes of the Recess Appointments Clause, a question that has not been addressed by the courts. In support of the President, the Office of Legal Counsel (OLC) concluded that the President may exercise the recess appointment power at any point when "the Senate is unable to provide advice and consent on appointments," including during pro forma sessions.[5] The OLC recognized, however, that there is litigation risk for such recess appointments because there are substantial counterarguments to its position.[6] For example, the Senate did conduct some business during its recent pro forma sessions, including passing a two-month extension of the reduced payroll tax during one of those sessions.[7] And, even assuming that a series of pro forma Senate sessions is deemed functionally equivalent to a recess lasting much longer than three days, there is a further question: Could such a "functional recess" be constitutionally valid without the consent of the House of Representatives required under section 5 of Article 1 of the Constitution for Senate adjournments lasting more than three days?

Second, there is a question whether the Senate's adjournment for fewer than three days is lengthy enough to constitute a "recess" within the meaning of the Recess Appointments Clause. Neither the Constitution nor any court opinion establishes a minimum period of time that the Senate must adjourn to constitute a "recess."[8] At least one Court of Appeals has held that a ten-day break in the middle of a Senate session—known as an "intrasession recess"—constituted a "recess" within the meaning of the Recess Appointments Clause.[9] And, the Department of Justice under the Clinton and the George W. Bush Administrations indicated that an intrasession break of *more than* three days is necessary to constitute a "recess" for purposes of the Recess Appointments Clause (a position adhered to by the Solicitor General as recently as 2010).[10] Older U.S. Attorney General opinions concluded that "an adjournment for 5 or even 10 days" does not constitute a "recess."[11] Following the previously accepted understanding, the Senate has been holding pro forma sessions every three days in an effort to prevent recess appointments.[12]

Whether There Was a Valid "Vacancy"

A general threshold question is whether an initial vacancy of a newly created position that requires Senate confirmation is the type of "vacancy" that can be filled through a recess appointment. Attorneys General have long taken position that it can be, and there is certainly precedent for Presidents making such appointments, including to the Resolution Trust Corporation.[13] Nevertheless, the issue has never been addressed by the courts.

A related question that is specific to the circumstances of the CFPB is whether a "vacancy" actually exists in light of the fact that the Dodd-Frank Act authorized the Secretary of the Treasury to perform certain functions of the CFPB until "the Director of the Bureau is confirmed by the Senate."[14] In other words, did the Dodd-Frank Act in essence create two positions: (1) an interim position, which is filled by the Secretary of the Treasury and is therefore not vacant, and that does not expire until a permanent Director is confirmed by the Senate; and (2) a permanent Director confirmed by the Senate? Even if this interpretation of the statute were accepted as not creating a "vacancy" for purposes of the Recess Appointments Clause, there would be a further question whether, in so doing, Congress unconstitutionally usurped the presidential appointment power under Article II of the Constitution.

Potential Consequences of an Invalid Recess Appointment

If the recess appointment of the new CFPB Director were deemed invalid—either because there was no "recess" or because there was no "vacancy"—then the CFPB's rulemaking, supervisory, and enforcement actions under the invalidly appointed Director also could be deemed to be *ultra vires* and therefore invalid. For instance, in a similar context, a district court granted a preliminary injunction enjoining the Office of Thrift Supervision (OTS) from appointing a conservator or receiver for a plaintiff savings and loan association because the plaintiff established the likelihood of prevailing on the merits of its claim that the OTS director was unconstitutionally appointed under the Appointments Clause and the subsequent acting director was invalidly appointed under the Vacancies Act.[15]

Indeed, trade associations already have challenged the authority of the National Labor Relations Board to implement and enforce a regulation on the grounds that three of the five Board members are not validly appointed because no "recess" existed.[16]

John C. Dugan, formerly Comptroller of the Currency from 2005-10, is a partner in Covington & Burling's Washington, DC office and chairs the firm's Financial Institutions Group. He advises clients on a range of legal matters affected by significantly increased regulatory requirements resulting from the financial crisis. During his five-year term, Mr. Dugan led the Office of the Comptroller of the Currency through the financial crisis and ensuing recession that resulted in extraordinary regulatory and supervisory actions for national banks of all sizes, including government assistance provided under the Troubled Asset Relief Program (TARP); resolutions of large, mid-size, and community banks; and the successful implementation of regulatory "stress tests."

Stuart Stock is a partner in Covington & Burling's Financial Institutions Group. His practice encompasses the full range of regulatory and other issues affecting the operations and expansion of domestic and foreign banking and other financial institutions, including bank and bank holding company acquisitions and mergers; bank product and geographic expansion, and other

bank regulatory matters; financial institutions enforcement matters; financial institutions legislation; and bank litigation (particularly in the area of federal preemption). He has worked extensively with all of the federal bank regulatory agencies, as well as with a number of other federal agencies and with many state bank regulatory bodies.

Keith Noreika is a partner in Covington & Burling's Washington, DC office where he specializes in banking regulation and related litigation. His practice includes the regulatory and business issues affecting the operations of domestic and foreign depository institution and other financial institutions, including bank and bank holding company acquisitions and mergers; bank activities, capital, and structure, and other bank regulatory matters; and litigation, particularly in the area of federal preemption. He has worked extensively with all of the federal bank regulatory agencies.

Jennifer Xi is an associate in Covington & Burling's Washington, DC office where she is a member of the Bank Regulatory and Insurance Coverage practice groups. Ms. Xi represents banks and other financial institutions on banking regulation and related litigation, with a focus on recently-enacted financial services legislation and federal preemption. She has conducted extensive research and advised clients on the structure, jurisdiction, and authority of the Consumer Financial Protection Bureau created by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

[1] 158 Cong. Rec. 1 (daily ed. Jan. 3, 2012). The adjournment was from 12:02 p.m. on January 3, 2012, to 11:00 a.m. on January 6, 2012. *Id.* The President also made three recess appointments to the National Labor Relations Board on the same date.

[2] U.S. Const. Art. II, § 2, cl. 3.

[3] *See, e.g.*, *Evans v. Stephens*, 387 F.3d 1220, 1223 (11th Cir. 2004) ("The Constitution, on its face, neither distinguishes nor limits the powers that a recess appointee may exercise while in office. . . . [D]uring the limited term in which a recess appointee serves, [he] is afforded the full extent of authority commensurate with that office."). In the context of the CFPB, however, a question has been raised whether the statutory language of the Dodd-Frank Act limiting the interim authority of the Secretary of the Treasury to exercise the CFPB's powers would similarly limit the authority of a recess-appointed Director of the CFPB. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 § 1066(a), 124 Stat. 1964 (2010) (codified at 12 U.S.C. § 5586(a)).

[4] A "term" of Congress begins on January 3 of each odd-numbered year and lasts for two years. Each term is divided into two sessions of one year each. *See* Office of the Clerk, House of Representatives, Legislative FAQs, http://clerk.house.gov/legislative/legfaq.aspx. Cordray was appointed on January 4, 2012, the beginning of the second session of the 112th Congress. Accordingly, his recess appointment expires at the end of the next session of Congress, *i.e.*, the first session of the 113th Congress, which is expected to conclude at the end of 2013.

[5] *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. Off. Legal Counsel 1, 10, 21 (2012).

[6] *Id.* at 1823.

[7] 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011).

[8] *See Evans v. Stephens*, 387 F.3d at 1225.

[9] *See id.* at 122426 (holding that recess appointment on the seventh day of a ten day intrasession recess was valid).

[10] *See* Brief for the United States in Opposition to Petition for a Writ of Certiorari at 11, *Evans v. Stephens*, No. 04-828 (2005) ("[T]he Recess Appointments Clause by its terms encompasses all vacancies and all recesses (with the single arguable exception of *de minimis* breaks of three days or less, *see* U.S. Const. Art. I, § 5, Cl. 4)"); Henry B. Hogue, *Recess Appointments: Frequently Asked Questions*, CRS Report for Congress 3 (Mar. 12, 2008) (citing Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment at 2426, *Mackie v. Clinton*, No. 93-cv-0032 (D.D.C. 1993)).

[11] 33 Op. Att'y Gen. 20, 25 (1921), *quoted in* Louis Fisher, *Recess Appointment of Federal Judges*, CRS Report for Congress 4 (Sept. 5, 2001). President Theodore Roosevelt once made a recess appointment during a "recess" of less than one day between Senate sessions, but a subsequent Senate Judiciary Committee Report "emphatically rejected" President Roosevelt's action. T.J. Halstead, *Recess Appointments: A Legal Overview*, CRS Report for Congress 10 (July 26, 2005).

[12] *See* Hogue, *supra* note 10, at 3.

[13] *Recess Appointments During an Intrasession Recess*, 16 Op. Off. Legal Counsel (1992) ("Attorneys General have long believed that the President has the power to make an original recess appointment to a newly created position.") (citing 19 Op. Att'y Gen. 261 (1889)).

[14] Dodd-Frank Act §1066(a) (codified at 12 U.S.C. § 5586(a)) (granting the Secretary of the Treasury interim authority "to perform the functions of the Bureau under this subtitle until the Director of the Bureau is confirmed by the Senate in accordance with section 1011").

[15] *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990). The Court of Appeals dismissed the appeal as moot because the President subsequently nominated and the Senate confirmed an OTS director. *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 903 F.2d 837 (D.C. Cir. 1990). *See also Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998) (ultimately rejecting plaintiff bank's argument that enforcement proceedings were null and void because a subsequent, validly appointed director ratified the enforcement order); *Franklin Sav. Ass'n v. Director of the Office of Thrift Supervision*, 740 F. Supp. 1535 (D. Kan. 1990) (holding that transitional director was appointed in violation of the Appointments Clause of the Constitution but nonetheless had *de facto* authority to appoint a conservator).

[16] *See* Motion of Certain Co-Plaintiffs for Leave to Supplement Their Complaints and Objection to Substitution of Defendants, *Nat'l Ass'n of Mfr. v. Nat'l Labor Relations Bd.*, No. 11-cv-01629 (D.D.C. Jan. 13, 2012).